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United States Trustee for Region 17

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:)	Case No. 19-30461 HLB
)	
SANDBOX SUITES, INC.,)	Chapter 11
)	
Debtor.)	Date: September 5, 2019
)	Time: 10:00 a.m.
)	Location: 450 Golden Gate Avenue
)	16 th Floor, Courtroom 19
)	San Francisco, California 94102
)	Judge: Honorable Hannah L. Blumenstiel

MOTION OF THE UNITED STATES TRUSTEE, PURSUANT TO 11 U.S.C. § 1112(b)
AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 1017(f) AND 9014, TO
CONVERT OR DISMISS CHAPTER 11 CASE

Tracy Hope Davis, United States Trustee for Region 17 (“United States Trustee”), by and through her undersigned counsel, hereby files this *Motion of the United States Trustee, Pursuant To 11 U.S.C. § 1112(b) and Federal Rules of Bankruptcy Procedure 1017(f) and 9014, to Convert or Dismiss Chapter 11 Case* (“Motion”).¹

¹ Hereafter, all references to “Section” in the Motion are to provisions of the Bankruptcy Code, 11 U.S.C. section 101 et. seq., unless otherwise indicated. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure.

1 “Cause” exists to convert or dismiss this case for several reasons. First, Sandbox Suites,
2 Inc. (“Debtor”) has failed to fully comply with an order of the Court. Second, the Debtor has
3 failed to provide information reasonably requested by the United States Trustee. Finally, the
4 Debtor has failed to pay the United States Trustee quarterly fees for the second quarter of 2019.
5 For these reasons, the United States Trustee has established cause to convert or dismiss this case
6 pursuant to Section 1112(b). The Motion is supported by the following Memorandum of Points
7 and Authorities incorporated herein, and the Declaration of Bankruptcy Analyst, Kristin A.
8 McAbee (“McAbee Decl.”) and exhibits filed concurrently herewith.

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10 **I. BACKGROUND FACTS AND PROCEDURAL POSTURE**

11 **A. Summary of Facts**

12 1. On April 26, 2019, the Debtor filed a voluntary Chapter 11 bankruptcy petition.²
13 ECF No.1.³ The Debtor is represented by Jen Lee Law, Inc. (“Counsel”). ECF No. 28. An
14 application to designate Mr. Roman Gelfer, the Chief Executive Office of the Debtor as the
15 Responsible Individual has been filed (ECF No. 36), but has not been approved as of the date of
16 this Motion. *See* PACER docket for Case No. 19-30461 HLB.

17 2. The Debtor’s case was dismissed on May 22, 2019, for failure to comply with an
18 order of the Court; however, an order vacating the dismissal order was entered on June 6, 2019.⁴
19 ECF Nos. 14, 16.

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23 ²The United States Trustee requests that the Court take judicial notice of the Debtor’s Petition, Schedules, Statement
24 of Financial Affairs, and other documents filed therewith, and any amendments thereto which are in the Court’s file
25 in this case pursuant to Fed. R. Evid. 201, as made applicable by Fed. R. Bankr. P. 9017. The information contained
26 in these documents, signed under penalty of perjury by Debtor, are admissions of the Debtor pursuant to Fed. R. Evid.
27 801(d).

28 ³ Unless otherwise noted, “ECF No.” refers to the main bankruptcy docket for case number, 19-30461 HLB.

⁴ The Initial Debtor Interview (“IDI”) was conducted on May 20, 2019, prior to the dismissal of the Debtor’s case.
See McAbee Decl., ¶ 7. After the conclusion of the IDI, the United States Trustee emailed Counsel requesting certain
IDI documents and any additional documents and/or amendments that were determined during the IDI. *Id.* at ¶ 8 and
Exhibit 1.

1 3. It appears the Debtor's case was filed due to "loss revenue, coupled with two
2 lawsuits for rent and breach of contract in connection with a former employee." ECF No. 31.
3 No information was provided with respect to the nature of the Debtor's business. *Id.*

4 4. The section 341(a) meeting of creditors was held and concluded on July 9, 2019.
5 *See* PACER docket for Case No. 18-30461 HLB. Due to a lack of interest, no official committee
6 of unsecured creditors has been appointed by the United States Trustee. *Id.*

7 5. According to Amended Schedule A/B, the Debtor's assets include cash
8 (\$16,230.53) and "office furniture, fixtures, and equipment" valued at \$28,000 ("Personal
9 Property"). ECF No. 38. The Debtor also listed a leasehold interest in the following real
10 properties: (i) 404 Bryant Street, San Francisco, California ("404 Bryant Street Property"); (ii)
11 1900 Addison Street, Suite 200, Berkeley, California; and (iii) 3505 El Camino Real, Palo Alto,
12 California ("El Camino Real Property"). *Id.*

13 6. The following debts were listed on the Debtor's Schedules:

14	a. Schedule D: Secured Claims	\$0.00
15	b. Schedule E: Priority Claims	\$8,820.80
16	c. Schedule F: General Unsecured Claims	\$371,495.23

17 ECF No. 13, 38.

18 **B. Failure to Provide Information Reasonably Requested by the United States Trustee**

19 7. By email to Counsel dated July 19, 2019, the United States Trustee reminded the
20 Debtor to provide, among other things, proof that the United States Trustee has been added to all
21 insurance policies as a party to be notified in the event of policy cancellation. McAbee Decl., ¶¶
22 9-10 and **Exhibit 2**. As of the date of this Motion, the Debtor has failed to provide proof that the
23 United States Trustee has been added to the El Camino Real Property insurance policy as a third-
24 party loss payee. *Id.* at ¶ 10.

25 **C. Failure to Fully Comply With the Court's July 18, 2019 Order**

26 8. On July 18, 2019, the Court issued an "Order Following Status Conference and
27 Setting Deadlines," ECF No. 33 which provides that on or before July 31, 2019, the Debtor shall,
28 among other things, file and serve on the United States Trustee a declaration explaining: (i) the

1 nature of the Debtor's business; (ii) the "Draws" identified in the statement of cash receipts
2 attached to the April/May Monthly Operating Report (ECF No. 30); (iii) the reason for the
3 Debtor's payment of the personal obligations of Mr. Roman Gelfer with an itemization of all
4 such payments, including dates, amounts, and the nature of the expense; and (iv) the accounting
5 expense disclosed in the April/May Monthly Operating Report including the amount and
6 payment ("July 18 Order"). ECF No. 33. The July 18 Order also states that the Debtor shall
7 provide any remaining outstanding information or documentation to the United States Trustee
8 and to add the United States Trustee as a third-party loss payee to insurance policies. *Id.*

9 9. As of the date of this Motion, the Debtor has not provided the United States
10 Trustee with the required declaration in accordance with the July 18 Order. McAbee Decl., ¶ 11.

11 **D. Failure to Pay United States Quarterly Fees**

12 10. As of the date of this Motion, the Debtor has unpaid quarterly fees of \$975.00 for
13 the second quarter of 2019. McAbee Decl., ¶ 12.

14 **E. Jurisdiction**

15 11. The Bankruptcy Court has jurisdiction over this bankruptcy case pursuant to 28
16 U.S.C. §§ 1334 and 157(b).

17 12. The United States Trustee bring this Motion pursuant to her statutory duty to
18 monitor bankruptcy cases under 28 U.S.C. § 586(a)(3).

19 13. The United States Trustee has standing to prosecute the Motion pursuant to 11
20 U.S.C. §§ 307 and 1112, and FRBP 1017 and 9014.

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1 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. Cause Exists Under 11 U.S.C. §§ 1112(b)(1) to Convert or Dismiss This**
3 **Bankruptcy Case.**

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5 11 U.S.C. §1112(b)(1) provides that:

6 Except as provided in paragraph (2) and subsection (c), on request .
7 . . the court shall convert a case under this chapter to a case under
8 chapter 7 or dismiss a case under this chapter, whichever is in the
9 best interests of creditors and the estate, for cause unless the court
 determines that the appointment under section 1104(a) of a trustee
 or an examiner is in the best interests of creditors and the estate.

10 Section 1112(b) includes a non-exclusive list of what constitutes “cause;” however, the
11 court should “consider other factors as they arise, and use its equitable power to reach the
12 appropriate result.” *Pioneer Liquidating Corp. v. United States Trustee (In re Consolidated*
13 *Pioneer Mortgage Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) *aff’d*, 264 F.3d 803 (9th
14 Cir. 2001). The bankruptcy court has broad discretion to determine what constitutes "cause"
15 adequate for dismissal or conversion under § 1112(b). *Id.*

16 As movant, the United States Trustee bears the burden of establishing by
17 preponderance of the evidence that cause exists. *Sullivan v. Harnisch (In re Sullivan)*, 522
18 B.R. 604, 614 (B.A.P. 9th Cir. 2014) (citation omitted). Where reorganization or rehabilitation
19 is unrealistic or futile, a chapter 11 case may be dismissed or converted even at its outset.
20 *Johnston v. Jem Dev. Co. v. Johnston (In re Johnston)*, 149 B.R. 158, 162 (B.A.P. 9th Cir.
21 1992). And, if a bankruptcy court determines that there is cause to convert or dismiss, it must
22 also: (1) decide whether dismissal, conversion is in the best interests of creditors and the estate;
23 and (2) identify whether there are unusual circumstances that establish that dismissal or
24 conversion is not in the best interests of creditors and the estate. *In re Sullivan*, 522 B.R. at
25 612.

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1 **B. Cause Exists Under 11 U.S.C. § 1112(b)(4)(E) because the Debtor has Failed**
2 **to Fully Comply With an Order of the Court.**

3 Section 1112(b)(4)(E) provides that a debtor's "failure to comply with an order of the
4 court" is cause to convert or dismiss a Chapter 11 case. 11 U.S.C. § 1112(b)(4)(E). This section
5 gives effect to the notion that compliance with a court order is a fundamental obligation of the
6 Debtor. As one court noted, "[b]ecause . . . violations [of a court's orders] are disrespectful to the
7 Court, they are disrespectful to the judicial process." *Babakitis v. Robino (In re Robino)*, 243
8 B.R. 472, 487 (Bankr. N.D. Ala. 1999). Further, this section does not require that the Debtor's
9 failure to comply be willful, in bad faith, or fraudulent. *In re Babayoff*, 445 B.R. 64, 80 (Bankr.
10 E.D.N.Y. 2011).

11 The deadline has passed to file and serve a declaration on the United States Trustee
12 explaining: (i) the nature of the Debtor's business; (ii) the "Draws" identified in the statement of
13 cash receipts attached to the April/May Monthly Operating Report (ECF No. 30); (iii) the reason
14 for the Debtor's payment of the personal obligations of Mr. Roman Gelfer with an itemization of
15 all such payments, including dates, amounts, and the nature of the expense; and (iv) the
16 accounting expense disclosed in the April/May Monthly Operating Report including the amount
17 and payment. *See* ECF No. 33; McAbee Decl., ¶ 11. Additionally, the Debtor has failed to
18 provide proof that the United States Trustee has been added to the El Camino Real Property
19 insurance policy as a third-party loss payee as required by the July 18 Order. McAbee Decl., ¶
20 11. Given the Debtor's failure to fully comply with the Court's July 18 Order, the United States
21 Trustee has established cause to either convert or dismiss this case pursuant to § 1112(b)(4)(E).

22 **C. Cause Exists Under 11 U.S.C. § 1112(b)(4)(H) Because Debtor Has Failed to**
23 **Provide Information Reasonably Requested by the United States Trustee.**

24 Cause also exists to dismiss or convert this case under § 1112(b)(4)(H). Pursuant to
25 § 1112(b)(4)(H), cause also includes "failure to timely provide information . . . reasonably
26 requested by the United States trustee" 11 U.S.C. § 1112(b)(4)(H). "This provision
27 imposes sanctions for a debtor's failure to reasonably cooperate with the UST, who is charged
28 under 28 U.S.C. § 586(a)(3) with the duty to "supervise the administration of cases" under the

Code.” *In re McKenna*, 580 B.R. 1, 3 (Bankr. D.R.I. 2017) (citing 7 *Collier on Bankruptcy* ¶ 1112.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2017)).

Although the United States Trustee reminded the Debtor (through Counsel) to provide proof that the United States Trustee has been added to all insurance policies as a party to be notified in the event of policy cancellation, the Debtor has not fully complied with this request. McAbee Decl., ¶¶ 9-10 and **Exhibit 2**. As of the date of this Motion, the Debtor has failed to provide proof that the United States Trustee has been added to the El Camino Real Property insurance policy as a third-party loss payee. *Id.* at ¶ 10. Consequently, the United States Trustee has met her burden and established cause for conversion or dismissal under § 1112(b)(4)(H).

D. Cause Exists Under 11 U.S.C. §1112(b)(4)(K) because of Debtor’s Non-payment of United States Trustee’s Quarterly Fees.

The United States Trustee is authorized by law to collect a mandatory quarterly fee from every debtor who files a chapter 11 bankruptcy case. *See* 28 U.S.C. § 1930(a)(6); *Sanders v. United States Trustee (In re Sanders)*, 2013 Bankr. LEXIS 4681, at *27 (B.A.P. 9th Cir. April 11, 2013) *citing Tighe v. Celebrity Home Entm’t, Inc. (In re Home Entm’t, Inc.)*, 210 F.3d 995, 998 (9th Cir. 2000). Quarterly fees are calculated based on the amount of disbursements made by a debtor during each quarter that the case is pending. If a chapter 11 debtor makes no disbursements during any quarter, the minimum fee that must be paid is \$325 for that quarter. *See* 28 U.S.C. §1930(a)(6) and Fed. R. Bankr. P. 2015(a)(5).

“Cause” under 11 U.S.C. § 1112(b)(4)(K) states that a case shall be converted or dismissed if a debtor has failed to pay any fees or charges required under 28 U.S.C. § 123. The United States Trustee’s quarterly fees are included in this section. *In re Sanders*, 2013 Bankr. LEXIS 4681, at *15-16.

Here, the Debtor has an outstanding balance of United States Trustee quarterly fees of \$975 in connection with the second quarter of 2019, which are past due.⁵ McAbee Decl., ¶ 12.

⁵The Debtor is required to pay any attendant interest in connection with delinquent quarterly fees. *See* 31 U.S.C. § 3717.

1 Based on the foregoing, the United States Trustee has established cause to either convert or
2 dismiss this case pursuant to § 1112(b)(4)(K).

3 **E. Once Cause is Established, Debtor Has the Burden of Establishing All**
4 **Elements of the Statutory Defenses Available Under 11 U.S.C. § 1112(b)(2).**

5 Once "cause" is established, the burden then shifts to the debtor to demonstrate that
6 §1112(b)(2) precludes relief under §1112(b)(1). *See In re Sanders*, 2013 Bankr. LEXIS 4681, at
7 *18-19. The only exception to conversion or dismissal would be if the bankruptcy court
8 specifically identifies "unusual circumstances . . . that establish that such relief is not in the best
9 interest of creditors and the estate." *See* 11 U.S.C. §1112(b)(1). For the exception to apply: (1)
10 the debtor must prove and the bankruptcy court must "find and specifically identify" that
11 "unusual circumstances" exist to show that conversion or dismissal is not in the best interest of
12 creditors and the estate; and (2) the debtor must prove that the cause for conversion or dismissal
13 was reasonably justified, and that the basis for dismissal or conversion can be "cured" within a
14 reasonable time. *See Warren v. Young (In re Warren)*, 2015 Bankr. LEXIS 1775, at *11-12
15 (B.A.P. 9th Cir. May 28, 2015). As noted, the debtor bears the burden of proving that unusual
16 circumstances are present in the case that render dismissal or conversion not in the best interest
17 of creditors or the estate. *In re Sanders*, 2013 Bankr. LEXIS 4681, at *18-19.

18 In addition to establishing unusual circumstances, a debtor or other respondents seeking
19 to avoid conversion or dismissal must establish the requirements set forth in Section
20 1112(b)(2)(A)–(b)(2)(B). Section 1112(b)(2) provides:

- 21 . . . and the debtor or any other party in interest establishes that–
22 (A) there is a reasonable likelihood that a plan will be
23 confirmed within the timeframes established in sections
24 1121(e) and 1129(e) of this title, or if such sections do not
25 apply, within a reasonable period of time; and
26 (B) the grounds for converting or dismissing the case
27 include an act or omission of the debtor other than under
28 paragraph (4)(A)
(I) for which there exists a reasonable justification
for the act or omission; and
(ii) that will be cured within a reasonable period
of time fixed by the court.

11 U.S.C. § 1112(b)(2) (emphasis added).

Importantly, the debtor must establish each of the statutory elements set forth under Section 1112(b)(2) because the statute is written in the conjunctive. *In re Om Shivai, Inc.* 447 B.R. 459, 465 (Bankr. D.S.C. 2011); *Landmark Atlantic Hess Farm, LLC*, 448 B.R. 707, 717 (Bankr. D. Md. 2011). Here, the record does not disclose any unusual circumstances that would establish justification against granting the relief requested in the Motion.

Conversion of this case to Chapter 7 appears to be a more appropriate remedy because there may assets that are available for distribution to unsecured creditors. *See Rand v. Porsche Fin. Servs. (In re Rand)*, 2010 Bankr. LEXIS 5076 (B.A.P. 9th Cir. Dec. 7, 2010) (citing 7 Collier on Bankruptcy ¶ 1112.04[7] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed., 2010)) (noting that one factor supporting conversion in lieu of dismissal is “[t]he ability of the trustee in a chapter 7 case to reach assets for the benefit of creditors.”).

In the alternative, the United States Trustee does not object to dismissal of the case, if the Court ultimately determines that such relief is in the best interests of the Debtor’s creditors and the estate.

III. PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, the United States Trustee respectfully requests this Court enter an order (1) granting the motion; (2) converting or dismissing the case; and (3) for such other and further relief as is just and appropriate.

Date: August 2, 2019

TRACY HOPE DAVIS
United States Trustee, Region 17

/s/ Marta E. Villacorta
MARTA E. VILLACORTA
Trial Attorney